2981 No. 15235

United States
Court of Appeals
for the Ninth Circuit

GEORGE H. COX, also known as GEORGE M. COX, Appellant,

vs.

ENGLISH-AMERICAN UNDERWRITERS and THE LONDON & LANCASHIRE INSURANCE COMPANY, LTD., Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Northern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —11-12-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

L. C. SMITH,
LEANDER W. PITMAN,
1321 Yuba Street,
Redding, California,
DEVLIN, DIEPENBROCK & WULFF,
HORACE B. WULFF,
414 - 926 J Building,
Sacramento, California,

Attorneys for the Plaintiff-Appellant.

HAUERKEN, ST. CLAIR & VIADRO,
GEORGE H. HAUERKEN,
635 Russ Building, 235 Montgomery Street,
San Francisco 4, California,
KENNEDY & CALDWELL,
1215 Placer Street, Redding, California,

Attorneys for the Defendants-Appellees.

In the Superior Court of the State of California in and for the County of Shasta
Exhibit "2"

No. 19784

GEORGE H. COX, aka, GEORGE M. COX,
Plaintiff,

vs.

ENGLISH-AMERICAN UNDERWRITERS and THE LONDON & LANCASHIRE INSURANCE COMPANY, LTD., a corporation,
Defendants.

COMPLAINT
(Breach of Contract)

Comes now the plaintiff, in the above entitled action and for cause of action alleges:

I.

That the contract on which this cause of action is based is in writing.

II.

That at all times herein mentioned, the defendant, The London and Lancashire Insurance Company, Ltd., was, and now is, a foreign corporation, organized and existing under the laws of the Kingdom of Great Britain and Ireland, and authorized to write and sell policies insuring against loss by fire. That said defendants was at said times authorized to carry on the business of writing policies of insurance in the State of California, by and through resident agents, and that one Frank B.

Plummer was its duly authorized agent at Redding, California.

III.

That plaintiff is not aware of the true capacity of defendant English-American Underwriters, whether individual, associate, corporate or otherwise; that leave of court will be asked to amend this complaint to show said defendant's true capacity when the same has been ascertained.

IV.

That on the 19th day of December, 1952, to and including the date of the fire hereinafter mentioned, the plaintiff was the owner of a dwelling house, household furniture and the personal property therein, at or near the City of Redding, County of Shasta, State of California, which said dwelling and household furniture and personal property therein, was covered by and included in the policy of insurance issued by defendants herein referred to.

V.

That in consideration of the premium of One Hundred Sixty-two and 50/100 ($162.50) Dollars paid to it by the plaintiff, the defendants, by its policy of insurance signed by one of its managers in the City of San Francisco, California, acting under power of attorney, and countersigned by its general agent, the DeVeuve & Company, at San Francisco, California, under date of December 24, 1952, and delivered to the plaintiff in the City of Redding, California, a copy of which policy of in-

surance is hereto annexed, marked "Exhibit A", and by this reference made a part hereof, insured the plaintiff against loss or damage by fire to the amount of Thirteen Thousand and no/100 ($13,000.00) Dollars on said property, from the 19th day of December, 1952, at 12 o'clock noon to December 19, 1955, at 12 o'clock noon.

VI.

That the plaintiff has duly performed all the conditions on his part to be performed, and on the 25th day of January, 1953, said dwelling and personal property were greatly damaged, in fact were totally consumed and destroyed by fire. That said fire did not occur from any of the causes excepted in said policy.

VII.

That the plaintiff's loss occasioned thereby was Eighteen Thousand Six Hundred Twenty-one and 57/100 ($18,621.57) Dollars.

VIII.

That the plaintiff immediately thereafter, on or about the 26th day of January, 1953, notified the defendants of said loss, and on or about the 20th day of March, 1953, and more than sixty days prior to the commencement of this action, furnished the defendants with due proof of said loss in writing. Subsequently on January 13, 1954, furnished said defendants with a Supplemental proof of Loss, which Supplemental proof of Loss was furnished at the request of said defendants.

IX.

That plaintiff received notice in writing on January 6, 1954, of defendants' election to appoint an appraiser, under the provisions of the aforesaid policy and thereafter plaintiff appointed an appraiser on the 15th day of January, 1954, but notwithstanding that plaintiff has complied with all the terms, covenants and conditions set forth and contained in said policy, said defendants have failed and refused, and still fail and refuse, to pay said plaintiff the sum of $13,000.00 due under the terms of said policy or any part or portion thereof. That no part of said loss has been paid, and the sum of $13,000.00 is now due, owing and unpaid from defendants to plaintiff, to plaintiff's damage in said sum. That no return or award of the aforesaid appraisers has been made or filed with either the plaintiff or the defendants prior to the filing of this complaint; that under the provisions of the aforesaid policy the time for commencement of suit will expire on January 25, 1954.

X.

That at all times herein mentioned the dwelling house owned by the plaintiff, as aforesaid, was occupied for dwelling house purposes with the aforesaid furniture and personal property therein.

Wherefore, plaintiff prays judgment against the defendants, and each of them, in the sum of $13,000.00 with interest thereon at the rate of seven per cent per annum from March 20, 1953, to and

including date of judgment, together with his costs of suit incurred herein.

L. C. SMITH and
LEANDER W. PITMAN,
Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed March 9, 1954.

In the United States District Court for the Northern District of California, Northern Division

No. 7037

GEORGE H. COX, also known as GEORGE M. COX, Plaintiff,

vs.

ENGLISH-AMERICAN UNDERWRITERS and THE LONDON & LANCASHIRE INSURANCE COMPANY, LTD., a corporation, Defendants.

ANSWER TO COMPLAINT

In answer to the complaint on file herein, defendant The London and Lancashire Insurance Compay, Ltd., a corporation (sued herein as English American Underwriters and as The London & Lancashire Insurance Company, Ltd., a corporation) admits, denies and alleges as follows:

I.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV.

II.

Defendant admits the allegations contained in Paragraph V except that defendant alleges that the copy of the policy of insurance attached to the complaint is not a complete copy of the policy issued by defendant to plaintiff in that it lacks an endorsement dated January 9, 1953, providing for a return premium of $13.00 from defendant to plaintiff.

III.

In answer to Paragraph VI, defendant denies that plaintiff has duly performed all the conditions on his part to be performed; defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said Paragraph VI; further answering said Paragraph VI, defendant alleges that plaintiff failed to render to defendant, within sixty days after the fire referred to in said paragraph VI or within any other time, a proof of loss as required by said policy; defendant further alleges that, although such an examination was demanded of him, plaintiff failed and refused to submit to an examination under oath as required in said policy; defendant further alleges that, as provided by said policy, it demanded an appraisement of said loss, that said appraisement has not yet been completed and that the award of the appraisers has not yet been filed with defendant.

IV.

Defendant denies each and every allegation con-

tained in Paragraph VII; further answering said Paragraph VII, defendant denies that plaintiff's loss was the sum of $18,621.57 or any other sum, or any sum at all.

V.

Defendant denies each and every allegation contained in Paragraph VIII.

VI.

In answer to Paragraph IX, defendant admits and/or alleges that it gave notice to plaintiff, on December 23, 1953, of its election to appoint an appraiser, but defendant is without knowledge or information sufficient to form a belief as to when plaintiff received notice of defendant's election to appoint an appraiser; defendant admits that plaintiff appointed an appraiser on or about January 15, 1954; that it has not paid to plaintiff the sum of $13,000, or any other sum; that the award of the appraisers had not been filed at the time of the filing of said complaint and has not yet been filed; further answering said Paragraph IX, defendant admits and/or alleges that, under the provisions of said policy, the time for the commencement of suit expires twelve months after the loss; as heretofore alleged, defendant does not know the date of plaintiff's alleged loss and defendant is accordingly without knowledge or information sufficient to form a belief as to the truth of plaintiff's allegations regarding the expiration of the time to commence suit under the policy; defendant denies each and

every other allegation contained in said Paragraph IX.

VII.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph X.

First Affirmative Defense

The complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

I.

The policy of insurance issued by defendant to plaintiff provides that no suit or action on said policy shall be sustainable unless all the requirements of said policy shall have been complied with.

II.

Said policy requires the assured to render to the company a proof of loss, as described in said policy, within sixty days after the loss.

III.

Plaintiff failed to render to defendant the proof of loss required by said policy either within sixty days after the date of his alleged loss or within any other period of time; by reason of the foregoing, plaintiff is barred from recovery in this action.

Third Affirmative Defense

I.

The policy of insurance issued by defendant to plaintiff provides that no suit or action on said

policy shall be sustainable unless all the requirements of said policy shall have been complied with.

II.

Said policy requires the assured to submit, as often as may be reasonably required, to examinations under oath by a person named by the company.

III.

Plaintiff failed to submit to such an examination under oath although such an examination was demanded of him by defendant; by reason of the foregoing, plaintiff is barred from recovery in this action.

Fourth Affirmative Defense

I.

The policy of insurance issued by defendant to plaintiff provides that no suit or action on said policy shall be sustainable unless all the requirements of the policy shall have been complied with.

II.

Said policy provides that, in case the assured and the company fail to agree as to the amount of the loss, said amount shall be determined by appraisers appointed in accordance with the terms of said policy.

III.

Plaintiff and defendant failed to agree as to the amount of plaintiff's alleged loss and, in accordance with the foregoing terms of said policy, defendant demanded that the amount of the loss be appraised;

said appraisement has not yet been completed and no award has been filed by the appraisers; by reason of the foregoing, plaintiff is barred from recovery in this action.

Fifth Affirmative Defense

I.

The policy of insurance issued by defendant to plaintiff provides as follows:

"This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."

II.

Defendant is informed and believes and therefore alleges on information and belief that, before the alleged loss, plaintiff wilfully concealed and misrepresented to defendant material facts concerning the subject of the insurance and particularly concerning the value of the property insured under said policy; and that, subsequent to the alleged loss, plaintiff was guilty of false swearing relating thereto; by reason of the foregoing plaintiff is barred from recovery in this action.

Sixth Affirmative Defense

I.

The policy of insurance issued by defendant to plaintiff provides that no suit or action on said

policy shall be sustainable unless all the requirements of the policy shall have been complied with.

II.

Said policy requires the assured to furnish to the company a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed.

III.

Plaintiff failed to furnish such an inventory although such an inventory was demanded of him by defendant; by reason of the foregoing, plaintiff is barred from recovery in this action.

Wherefore, defendant prays judgment that plaintiff take nothing by his complaint and that defendant have its costs of suit incurred herein and such further relief as is proper in the premises.

/s/ GEORGE H. HAUERKEN,
/s/ HAUERKEN, ST. CLAIR & VIADRO,
/s/ KENNEDY & CALDWELL,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 16, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANT

To the plaintiff above named and to L. C. Smith and Leander W. Pitman, his attorneys.

Take notice that on Monday, 8 November 1954, in the Courtroom of the above entitled court located in the United States Post Office and Courts Building on Eye Street between Eighth and Ninth, Sacramento, California, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, the above named defendant will move the court for summary judgment, all as more fully set forth in the Motion for Summary Judgment filed and served herewith.

Said motion will be made upon the grounds specified in the attached motion papers and will be based upon this notice, said motion papers and the pleadings, records and files in this action, together with the affidavits served herewith.

Dated at San Francisco, California, 18 October, 1954.

/s/ GEORGE H. HAUERKEN,
/s/ HAUERKEN, ST. CLAIR & VIADRO,
/s/ KENNEDY & CALDWELL,

Acknowledgment of Service attached.

MOTION FOR SUMMARY JUDGMENT

The defendant, The London & Lancashire Insurance Company, Ltd., a corporation, (sued herein as English-American Underwriters and as The London

& Lancashire Insurance Company, Ltd., a corporation) by George H. Hauerken, Hauerken, St. Clair & Viadro and Kennedy & Caldwell, its attorneys, hereby moves the court to enter summary judgment for the defendant, in accordance with the provisions of Rule 56 (b) and (c) of the Rules of Civil Procedure, on the grounds that the pleadings and affidavits of:

(1) John W. Smith
(2) Laurence J. Kennedy, Jr.
(3) A. J. Stocklmier
(4) H. T. Russell
(5) George H. Hauerken

hereto attached show that the defendant is entitled to judgment as a matter of law.

/s/ GEORGE H. HAUERKEN,
/s/ HAUERKEN, ST. CLAIR & VIADRO,
/s/ KENNEDY & CALDWELL,
Attorneys for Defendant

Supporting Memorandum

The submission to arbitration is a condition precedent to the filing of a cause of action under a fire insurance policy, and until such submission is made, no cause of action exists. See:

(1) The photo copy of the policy attached to the complaint and particularly lines 117 to 133, inclusive.

(2) Sauzelito L. & DD Co. vs. Commercial Union Insurance Company, 66 Cal. 253.

(3) Adams vs. South British & National Fire & Marine Insurance Company of New Zealand, 70 Cal. 198.

(4) Section 2071 of the Insurance Code of California.

SUMMARY JUDGMENT (PROPOSED)

The motion of the defendant for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure having been presented and the court being fully advised, the court finds that there is no genuine issue as to whether or not the plaintiff submitted to the demand of the defendant for an appraisal pursuant to the terms and conditions of the policy of insurance referred to in the complaint prior to the filing of this action, and that the plaintiff did not submit to, and that there has been no appraisal pursuant to the terms of the policy of insurance, prior to the filing of this action, and that the defendant is entitled to a summary judgment.

It Is Therefore Ordered, Adjudged and Decreed that the defendant's motion for summary judgment be, and the same is hereby, granted, and that defendant recover its costs and charges pursuant to law.

Dated: November ....., 1954.

.....,
Judge of U. S. District Court

AFFIDAVIT OF JOHN W. SMITH

State of Maine,
County of Knox—ss.

John W. Smith, being first duly sworn, deposes and says:

I am John W. Smith and have personal knowledge of the facts herein set forth.

On 20 March 1953, the Sacramento office of General Adjustment Bureau, Inc., in which office I am an adjuster in the Fire Division, received a Proof of Loss dated 16 March 1953 purportedly signed by plaintiff with respect to damages alleged to have been sustained as a result of the fire referred to in the Complaint on file herein, and which Proof of Loss showed a claim in the amount of Twelve Thousand ($12,000) Dollars. A photo copy of said Proof of Loss is attached hereto marked Exhibit "A" and made a part of this affidavit.

On 29 April, 1953, I wrote a letter to plaintiff on behalf of the defendant requesting an examination under oath on 7 May 1953, a copy of which letter is attached hereto marked Exhibit "B" and made a part of this affidavit.

On 30 April, 1953, I wrote a letter to plaintiff on behalf of the defendant taking exception to the Proof of Loss, a copy of which letter is attached hereto marked Exhibit "C" and made a part of this affidavit.

Both said letters of 29 April and 30 April, 1953 were placed by me in the United States mail, postage prepaid, and addressed to plaintiff at his post

office address known to me to be care of Redding Tire Service, 2638 Angelo, Redding, California.

/s/ JOHN W. SMITH

Subscribed and sworn to before me this 9 day of October, 1954.

[Seal] /s/ ELMER C. DAVIS,
Notary Public in and for the County of Knox, State of Maine.

EXHIBIT "A"
SWORN STATEMENT IN PROOF OF LOSS

Policy Number: 983103.
Amount of Policy: $13,000.
Issued: Dec. 19, 1952; Expires: Dec. 19, 1955.
Agency Name: Frank Plummer, Redding.

To the English-American Underwriters—Agency of London, and Lancashire Insurance Company—London, England.

At the time of loss, by the above indicated policy of insurance you insured George H. Cox against loss by Fire upon the property described under Schedule "A", according to the terms and conditions of the said policy and all forms, endorsements, transfers and assignments attached thereto.

1. Time and Origin: A fire loss occurred about the hour of 1:20 o'clock a.m., on the 25 day of January, 1953. The cause and origin of the said loss were: Undetermined.

2. Occupancy: The building described, or containing the property described, was occupied at the

time of the loss as follows, and for no other purpose whatever: Dwelling.

3. Title and Interest: At the time of the loss the interest of your insured in the property described was: Owner. No other person or persons had any interest therein or incumbrance thereon, except.....

4. Changes: Since the said policy was issued there has been no assignment thereof, or change of interest, use, occupancy, possession, location or exposure of the property described, except: None.

5. Total Insurance: The total amount of insurance upon the property described by this policy was, at the time of the loss, $13,000, as more particularly specified in the apportionment attached under Schedule "C", besides which there was no policy or other contract of insurance, written or oral, valid or invalid.

6. The Cash Value of said property at the time of the loss was $14,670.40.

7. The Whole Loss and Damage as stated under Schedule "B" was $14,670.40.

8. The Amount Claimed under the above numbered policy is $12,000.00.

The said loss did not originate by any act, design or procurement on the part of your insured, or this affiant; nothing has been done by or with the privity or consent of your insured or this affiant, to violate the conditions of the policy, or render it void; no articles are mentioned herein or in annexed schedules but such as were destroyed or damaged at the

time of said loss; no property saved has in any manner been concealed, and no attempt to deceive the said company, as to the extent of said loss, has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof.

The furnishing of this blank or the preparation of proofs by a representative of the above insurance company is not a waiver of any of its rights.

/s/ GEORGE H. COX, Insured

State of California,
County of Shasta—ss.

Subscribed and sworn to before me this 16th day of March, 1953.

/s/ [Illegible], Notary Public

Schedule "A"—Policy Form

Policy Form No. S. F. B.-184-C. Dated 4/50.

Item 1. $10,000.00 on dwelling.

Item 2. $3,000.00 on H. H. F.

* * * * *

Situated approximately—3 miles South Redding N/S—West End—Olney Creek Rd.

* * * * *

Loss, if any, payable to assured.

* * * * *

EXHIBIT "B"

General Adjustment Bureau, Inc.
906-15th Street, Sacramento 14, California
Registered Letter Return Receipt Requested—Deliver to Addressee Only. April 29, 1953

Mr. George M. Cox
c/o Redding Tire Service
2638 Angelo, Redding, California

Re: English-American Underwriters Agency of The London & Lancashire Insurance Co. Policy No. P 983103. Bureau File RED-3-168-F.

Dear Mr. Cox:

You are hereby advised and you will please take notice that the undersigned English-American Underwriters Agency of The London & Lancashire Insurance Company, Ltd., has elected to, and in accordance with the pertinent provisions of the above described policy does hereby elect to examine you, under oath, with reference to the fire loss which is alleged to have occurred on January 25, 1953 and with respect to the contents of the purported Proof of Loss thereafter delivered by you to said company in connection with your claimed loss resulting from said fire.

You are hereby notified that said sworn examination will be conducted by Attorney Laurence J. Kennedy, Jr. at his office in the Shasta County Court House, Redding, California, on Thursday morning May 7, 1953 at 10:00 a.m. on said date.

You are hereby notified, in accordance with the terms and conditions of said policy, to be present at

said time and place for the purpose of said sworn examination. If impossible to be in the office of the attorney at the time specified, please telephone Mr. Kennedy.

Yours very truly,

English-American Underwriters Agency of The London & Lancashire Insurance Company, Ltd.

By General Adjustment Bureau, Inc.

By John W. Smith,
Adjusting Representative

JWS-c

EXHIBIT "C"

General Adjustment Bureau, Inc.
906-15th Street, Sacramento 14, California

Registered—Return Receipt Requested—Deliver to Addressee Only. April 30, 1953

Mr. George M. Cox
c/o Redding Tire Service
2638 Angelo, Redding, California

Re: English-American Underwriters of London and Lancashire Insurance Company. Policy No. P 983103. Bureau File BED-3-168-F.

Dear Mr. Cox:

The English-American Underwriters of The London and Lancashire Insurance Company hereby acknowledges receipt of an instrument purporting to be Proofs of Loss under its Policy No. P 983103, which instrument is dated March 16, 1953 and was received by said Company on March 20, 1953.

You are hereby notified that this purported Proof

of Loss does not fulfill the requirements of the terms and conditions of the above numbered policy for the following reasons:

In said instrument the total cash value and loss and damage is stated at $14,670.40, but no analysis or breakdown of this figure is given, nor is there any detailed statement of loss other than this lump sum given, nor is there any data contained in the said instrument from which these matters can be determined.

Said instrument does not state the nature of your interest and the interests of all others in the propery nor the encumbrances, if any, and the amount thereof upon the property described in the above numbered policy.

Said instrument refers to George H. Cox as having an interest in said property described in the above numbered policy but does not state the nature and extent of his interest.

Said instrument does not state the insured's belief as to the origin of said loss. It is only stated that the origin is unknown to him.

Because of these defects in the purported Proofs of Loss, you may wish to remedy this incompleteness by filing amendments correcting the hereinabove deficiencies to the end that the undersigned insurance company may have suitable evidence upon which they may intelligently determine the amount of loss and the extent of their liability, if any, under the terms and conditions of their policy for the alleged claim. If so, such amendments should be properly acknowledged and identified as intended

to form a part of the purported Proof of Loss heretofore filed.

You are hereby notified and required to furnish this company with verified plans and specifications of the building claimed to have been destroyed or damaged.

The writing of this letter and the retention of the purported Proofs of Loss which have been filed shall not be construed as an admission or denial of liability or an admission of the amount of loss claimed by you or a waiver on the part of the undersigned company of any of the terms, conditions or provisions of its policy contract or any forfeitures thereunder, but the same are hereby specifically reserved.

Yours very truly,

English-American Underwriters of London and Lancashire Insurance Company

By General Adjustment Bureau, Inc.
Adjusting Representatives

Per: .....
John W. Smith, Adjuster
Fire Division

JWS:m

AFFIDAVIT OF LAURENCE J. KENNEDY, JR.

State of California,
County of Shasta—ss.

Laurence J. Kennedy, Jr., being first duly sworn, deposes and says:

I am Laurence J. Kennedy, Jr. and have personal knowledge of the facts herein set forth.

Referring to letter of 29 April 1953 in the Affidavit of John W. Smith filed concurrently herewith, I am the Laurence J. Kennedy, Jr. named in said letter.

Plaintiff did not appear at my office in the Shasta County Court House, Redding, California, on Thursday morning, May 7, 1953 at 10:00 a.m. of said date or at any other time up to 7 January 1954 for the purposes referred to in said letter of 29 April 1953.

On 8 May 1953, I received a letter in the ordinary course of mail from L. C. Smith, a copy of which is attached hereto marked Exhibit "A" and made a part of this affidavit.

Plaintiff herein filed action 19286 in the Superior Court of the State of California, in and for the County of Shasta, against the defendant herein, through his attorneys, L. C. Smith and Leander W. Pitman. On 17 July 1953, the undersigned, through his firm Kennedy & Caldwell, filed an answer to said action on behalf of the defendant. On 4 November 1953, a judgment of non-suit was entered in said action in favor of the defendant and against the plaintiff on the grounds that plaintiff had re-

fused to comply with the provisions in the policy pertaining to examination under oath specifically requested in letter dated 29 April 1953 attached to the John W. Smith affidavit filed concurrently herewith.

On 7 January 1954, pursuant to letter written by plaintiff to defendant under date of 21 December 1953 offering to submit to examination under oath and pursuant to letter written by defendant to plaintiff under date of 23 December 1953 accepting said offer, both of which letters are attached to the affidavit of A. J. Stocklmier filed concurrently herewith, plaintiff appeared for oral examination at the office of affiant and was orally examined.

/s/ LAURENCE J. KENNEDY, JR.

Subscribed and sworn to before me this 1st day of October, 1954.

[Seal] /s/ MARY L. McKINNEY,

Notary Public in and for the County of Shasta, State of California.

EXHIBIT "A"

Lawrence Kennedy, Jr. May 7, 1953
Attorney at Law
Courthouse, Redding, California

Dear Mr. Kennedy:

I am writing in connection with the claim of George Cox, Policy No. P983103, upon which there has been a number of oral and written examinations, not less than four in number, some of which

were reduced to writing and under oath, and now you want another one. After all, there is an end to this third degree some place.

We regard your present action as not a reasonable request within the terms of the policy, but one to annoy and harrass these people as a substitute for your promise to pay in the event of a loss. For these reasons your request for another and additional oral examination is refused.

When we bring suit, you will again have the right to take these people's deposition, if you feel so disposed. At that time they will be represented by counsel and the necessary interrogations will be confined and circumscribed by rules of evidence.

Very truly yours,

LCS:jss L. C. Smith

AFFIDAVIT OF A. J. STOCKLMIER

State of California,
City and County of San Francisco—ss.

A. J. Stocklmier, being first duly sworn, deposes and says:

I am A. J. Stocklmier and have personal knowledge of the facts herein set forth.

On 21 December 1953, plaintiff wrote a letter to the defendant, care of my attention as manager of the defendant, offering to submit to examination under oath, a copy of which is attached hereto marked Exhibit "A" and made a part of this affidavit.

On 23 December 1953 and in response to said

letter of 21 December 1953, I wrote a letter to plaintiff, a copy of which letter is attached hereto marked Exhibit "B" and made a part of this affidavit.

On 13 January 1954, plaintiff wrote a letter to defendant, care of my attention as manager of defendant, a copy of which is attached hereto marked Exhibit "C" and made a part of this affidavit.

With said letter of 13 January 1954, plaintiff enclosed a Supplemental Proof of Loss suggested in letter of 30 April 1953 by John W. Smith as indicated in the John W. Smith affidavit filed concurrently herewith.

Said letter of 23 December 1953 was placed by me in the United States mail, postage prepaid, addressed to plaintiff at Box 704, Redding, California, his post office address as indicated in the letter of 21 December 1953, Exhibit "A".

At all times mentioned in the complaint on file herein, I was and now am the manager of the defendant, and the General Adjustment Bureau, Inc., through John W. Smith, was our adjusting representative with respect to the matter referred to in the complaint on file herein.

/s/ A. J. STOCKLMIER,
Manager and Attorney in Fact

Subscribed and sworn to before me this 30th day of September, 1954.

[Seal] /s/ SELMA R. CONLAN,
Notary Public in and for the City and County of San Francisco, State of California

EXHIBIT "A"

Box 704, Redding, California
December 21, 1953

The London and Lancashire Insurance Co., Ltd.
c/o A. J. Stocklmier
Manager and General Process Agent for California
332 Pine Street, San Francisco 4, California

Re: Policy No. PCD 983103

Gentlemen:

Reference is made to your fire policy No. PCD 983103 issued to me covering a frame dwelling approximately three miles south of Redding, Shasta County, California, on the north side of West and Olney Creek Road in the sum of $10,000.00, and furniture and fixtures located therein in the sum of $3,000.00.

Proof of loss having been heretofore made to your Company and suit for the collection of the benefits of the policy was filed in the Superior Court of Shasta County in an action entitled, "Cox vs. The London and Lancashire Insurance Company, Ltd., a corporation, and numbered therein 19286, at which time there was moved, during the course of the trial, that a judgment of non-suit be granted upon the ground and for the reason that I had not submitted to an oral examination under oath. The fire occurred on January 25, 1953.

You are hereby notified, and you will please take notice that I will submit and am now offering to submit to an oral examination under oath, relating to competent and material matters connected with

the issuance of the policy and the loss claimed thereunder, and should you fail to request me to submit to such an examination, your right to have such examination will and is intended to be by you waived.

Very truly yours,

George H. Cox, aka
George M. Cox

EXHIBIT "B"

December 23, 1953

Registered letter—Return Receipt Requested.
George H. Cox, also known as George M. Cox
Box 704, Redding, California

Re: Policy No. PCD 983103

Dear Mr. Cox:

Your registered mail letter of December 21, 1953 offering to now submit to an examination under oath was received by us on December 22, 1953.

We accept your offer to submit to an examination under oath and designate the 7th day of January, 1954 at 10:00 a.m. in the office of Laurence J. Kennedy, Jr., Esq., at the Courthouse in Redding, California, as the time and place for the taking of the examination under oath, and we further designate Mary McKinney, a notary public, as a person before whom such examination under oath may be taken, and advise that in the event that said Mary McKinney be not available, that the examination under oath be taken before some other notary public.

The examination will be conducted by our attorneys, George H. Hauerken, 535 Russ Building, San Francisco, California, Telephone GArfield 1-2462, and Laurence J. Kennedy, Jr., Courthouse, Redding, California, telephone 956. If the examination is not completed on that day, it will be continued from day to day thereafter at the same place between the hours of 10:00 a.m. and 5:00 p.m. until completed.

If that date is unsatisfactory to you, please communicate in writing with Mr. Hauerken or Mr. Kennedy. Either is authorized to agree with you as to another date, but their agreement must be in writing.

We hereby invoke the provisions of the policy of insurance calling for an appraisal and hereby demand that an appraisal be had pursuant to the policy terms and conditions. We hereby select Howard T. Russell, c/o C. J. Hopkinson Co., 1810 - 28th Street, Sacramento, California, Telephone HIllcrest 6-6423, as our appraiser. We ask that you be good enough to advise us, in writing, and that you also advise our appraiser, in writing, within the time provided by the policy, of the name and address of the appraiser selected by you pursuant to the terms and conditions of the policy.

Very truly yours,

London & Lancashire Insurance Company, Ltd.

By .....,
A. J. Stocklmier, Manager

EXHIBIT "C"

L. C. Smith, Attorney at Law
Redding, California

Telephone 66 January 13, 1954

The London & Lancashire Insurance Co., Ltd.
c/o A. J. Stocklmier, Manager and General Process Agent for California
332 Pine Street, San Francisco 4, California

Re: Policy PCD 983103

Gentlemen:

Your letter of December 23 reached me on the night of January 6, 1954, it having been sent to Box 704, Redding, California, and pursuant to that letter I appeared at the office Laurence J. Kennedy, Jr. at 10:00 a.m. with my counsel, Leander Pitman, and testified under oath before a Notary Public in the presence of a Court Reporter, who took it down in shorthand and agreed to transcribe the proceedings.

The examination was conducted by George H. Hauerken, 535 Russ Building, San Francisco, California, and was completed on the 7th day of January, 1954.

Reference is made to the last paragraph of your letter wherein you select Howard T. Russell as an appraiser and ask for the name and address of the appraiser selected by me.

Without admitting and reserving the right to object and protest to the appointment of Howard T. Russell as a disinterested appraiser and with-

out waiving that feature of the policy, I nominate, appoint and name H. J. Bachtold, 1740 Chestnut Street, Redding, California, as a competent and disinterested appraiser and have authorized and directed him to contact you, or you may contact him, for immediate performance of the duties prescribed by the terms of my Policy No. PCD 983103.

I also enclose herewith Supplemental Proof of Loss.

I demand that you, forthwith, and in any event on or before January 22, 1954 at 4:00 o'clock p.m. of said day, pay to me the sum of $13,000.00 for the loss sustained by the fire, covered by the Policy No. PCD 983103, and if payment of said sum is not made within that time, your failure shall constitute an unconditional refusal to pay and a denial of liability.

Very truly yours,

George H. Cox, aka
George M. Cox

encl.

AFFIDAVIT OF H. T. RUSSELL

State of California,
County of Sacramento—ss.

H. T. Russell, being first duy sworn, deposes and says:

I am H. T. Russell and have personal knowledge of the facts herein set forth.

On 17 January 1954, I received a letter from Harry Bachtold, a copy of which is attached hereto

marked Exhibit "A" and made a part of this affidavit.

I had previously been notified of my appointment by the defendant as an appraiser. On 27 January 1954, I telephoned Harry Bachtold at Redding, California, at which time I asked him when we could get together and work out an appraisal of the Cox loss. Harry Bachtold informed me that the weather was very bad, and that he was more or less under the weather, and that he would let me know when we could get together. We discussed the appointment of an umpire, and Harry Bachtold said that he did not think this would be necessary and thought we could agree without an umpire. I informed him that I thought we should appoint an umpire.

I next heard from Harry Bachtold when he wrote me a letter on 23 February 1954, a copy of which is attached hereto marked Exhibit "B" and made a part of this affidavit. I responded to the letter of 23 February 1954 of Mr. Bachtold by my letter of 25 February 1954, a copy of which is attached hereto marked Exhibit "C" and made a part of this affidavit. Since the date of my letter of 25 February 1954, I have never heard from Mr. Bachtold with respect to the appraisement or any other matter pertaining to this loss.

Said letter dated 25 February 1954 was placed by me in the United States Mail, postage prepaid, and addressed to plaintiff at Box 311, Redding, California, which was the return address of the

said H. J. Bachtold indicated on the envelope containing his letter of 23 February 1954.

/s/ H. T. RUSSELL

Subscribed and sworn to before me this 4 day of October, 1954.

[Seal] /s/ S. Ferryman,

Notary Public in and for the County of Sacramento, State of California

EXHIBIT "A"

Howard T. Russell January 15, 1954
c/o C. J. Hopkinson & Company
1810 28th Street, Sacramento, California

In re: Cox vs. London & Lancashire Ins. Co.

Dear Sir:

Mr. George H. Cox of Redding, California advises that he is the holder of a policy of insurance issued by the London and Lancashire Insurance Ltd. of London, England, which said policy is numbered PCD 983103, and that the property covered by this policy was destroyed by fire on January 25, 1953.

He also advised under the terms of that policy that the Company chose to appoint appraisers, and that you were appointed the Company's appraiser.

Mr. Cox in turn appointed the writer his appraiser pursuant to the provisions of that policy.

Tomorrow I expect to examine the testimony given at the trial of the case, the proof of loss, a copy of which I have in my possession, and ascer-

tain the materials and costs in this locality as of January 25, 1953. Thereafter I will be prepared to proceed with our duties. I will be available, on any day of the week between Monday and Friday, inclusive, before 8 o'clock in the morning and after 5 o'clock p.m., or on any Saturday or Sunday at anytime. My address is 1740 Chestnut Street, Redding, Calif.; my telephone number is Redding 272W. Mr. Cox expressed the view that he would like to have the matter disposed of at an early date.

Trusting that you will arrange to meet me for the disposal of this matter immediately, I am

Yours very truly,

.....

Harry Bachtold

EXHIBIT "B"

H. T. Russell February 23, 1954
1810 - 28th Street, Sacramento, California

Re: Cox vs. London & Lancashire Ins. Co.

Dear Sir:

Another relapse has put me back on the sick list, and it may be a few weeks until I get ahold of myself again.

I have not been pressed by anyone at this end, so there is no immediate urgency.

Thanks for your phone call.

Sincerely,

H. J. Bachtold

EXHIBIT "C"

Mr. H. J. Bachtold February 25, 1954
Box 311, Redding, California

Dear Mr. Bachtold:

Thank you for your letter of February 23.

I am sorry to learn of your illness and hope that you will soon be fully recovered.

Let me know when you are ready to proceed with the appraisal, and I will try to make arrangements to see you up there.

Very truly yours,
H. T. Russell

AFFIDAVIT OF GEORGE H. HAUERKEN

State of California,
City and County of San Francisco—ss.

George H. Hauerken, being first duly sworn, deposes and says:

I am George H. Hauerken and have personal knowledge of the facts herein set forth.

I am the George H. Hauerken who is a partner in the firm of Hauerken, St. Clair & Viadro and who is one of the counsel for the defendant in the above entitled proceeding and appear as an attorney of record for the defendant in the above entitled proceeding.

On 24 September 1954, I received in the ordinary course of mail a letter written by Leander W. Pitman, one of the attorneys for the plaintiff, addressed to the Honorable Albert F. Ross under

date of September 21, 1954, a photo copy of which, together with a photo copy of the face of the envelope in which said letter was received, is attached hereto marked Exhibit "A" and made a part of this affidavit.

On 24 September 1954, I received in the ordinary course of mail what purports to be a carbon copy of a letter written by the Honorable Albert F. Ross to said Leander W. Pitman, a photo copy of which, together with a photo copy of the face of the envelope in which said letter was received, is attached hereto marked Exhibit "B" and made a part of this affidavit.

/s/ GEORGE H. HAUERKEN

Subscribed and sworn to before me this 1st day of October, 1954.

[Seal] /s/ ENA QUETIN TUSSI,
Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "A"

[Letterhead of Leander W. Pitman]

[Stamped] Received Sep 24, 1954 G. H. H.

Honorable Albert F. Ross Sept. 21, 1954
Judge of the Superior Court
Redding, California

Re: Cox vs. London & Lancashire Insurance Co.
Federal District Court Case No. 7037

Dear Judge Ross:

The London & Lancashire Insurance Company,

Ltd. has invoked the provisions of its fire insurance policy No. PCD 983103 calling for an appraisal, and has demanded that an appraisal be had pursuant to the policy terms and conditions.

In this connection, it has selected Mr. Howard T. Russell of Sacramento as its appraiser.

Mr. George H. Cox, the insured under the above policy and whom we represent, has selected Mr. Harry J. Bachtold of Redding as his appraiser.

The above numbered policy provides as follows: "The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located."

Pursuant to the quoted provision of the policy in question, Mr. George H. Cox respectfully requests that you select an umpire so that the appraisal of the fire loss in question may be completed.

Thank you for your courtesy in this matter.

Very truly yours,

/s/ By Leander W. Pitman,

L. C. Smith and Leander W. Pitman, Attorneys for George H. Cox

cc: Mr. George H. Hauerken, Hauerken, St. Clair & Viadro, 235 Montgomery Street, San Francisco, California.

[Envelope]

Leander W. Pitman [Canceled Postage Stamp]
Attorney at Law, Anglo Bank Building
1320 Yuba Street, Redding, California

Mr. George H. Hauerken
Hauerken, St. Clair & Viadro
Attorneys at Law
535 Russ Building
235 Montgomery Street
San Francisco 4, California

EXHIBIT "B"

The Superior Court of the State of California
in and for the County of Shasta

Albert F. Ross Judge
Richard B. Eaton, Judge

[Stamped] Received Sep 24 1954 G. H. H.

Leander W. Pitman September 22, 1954
Attorney at Law
1320 Yuba Street, Redding, California

Re: Cox vs. London & Lancashire Insurance Co.
Federal District Court Case No. 7037

Dear Mr. Pitman:

Answering your letter of September 21, 1954, I will name W. N. Zachary, Realtor of Redding. I believe he would be entirely neutral in this matter and is a good appraiser.

Sincerely yours,

Albert F. Ross
Judge of the Superior Court

AFR/ns—cc: Mr. George H. Hauerken, Hauerken, St. Clair & Viadro, 235 Montgomery Street, San Francisco, California.

[Envelope]

Albert F. Ross [Canceled Postage Stamp]
Judge of the Superior Court
Shasta County, Redding, California
Hauerken, St. Clair & Viadro
235 Montgomery Street
San Francisco, California

Attn: Mr. George H. Hauerken

Affidavit of Service attached.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE H. COX

State of California,
County of Sacramento—ss.

George H. Cox, being first duly sworn, on oath deposes and says:

That I am the plaintiff in the above entitled action and I was the insured under the policy of fire insurance which is the subject matter of the above entitled action. That my dwelling and furniture and all other contents thereof were totally destroyed by a fire which started at approximately 1:20 o'clock a.m. on the 25th day of January, 1953. In helping my wife, children and another resident of my house to escape from said burning dwelling, I was cut with glass which required medical attention. Immediately after I was treated, I called

Frank Plummer, insurance agent at Redding, from whom I procured the subject policy. I reported the fire loss to him and he advised me that the adjuster for the said insurance carrier was the General Adjustment Bureau, Inc. who maintained an office in Redding of which Mr. J. S. Rogers was in charge. Mr. Plummer volunteered to contact Mr. Rogers for me and Mr. Rogers then contacted me and we went to the scene of the fire at 10:00 a.m. in Mr. Rogers' car. During the course of said trip, I made a full disclosure of all facts and circumstances surrounding the fire and the losses thereby suffered and answered all questions that Mr. Rogers propounded. Thereafter, for three or four times or more, I contacted Mr. Rogers and Mr. Plummer for the purpose of them to procure blank proofs of loss and for their assistance in doing all things that were necessary under the said policy for me to do to effect the collection of my loss thereunder. It was not until the 16th of March, 1953, that Mr. Rogers advised me that he was ready to assist me in the preparation of the proofs of loss. Several days prior to March 16, 1953, Mr. Rogers had requested that I procure an inventory of all the personal property destroyed with the exception of the personal wardrobe of myself and family explaining to me that they had a lump sum allotment covering the loss of personal wardrobe and hence it was not necessary to furnish any detail therefor and pursuant to that request, I had dropped off, at Mr. Rogers' office several days prior to the 16th day of March, an inventory which he agreed

to forward to the insurance carrier with the proofs of loss.

On the morning of March 16, 1953, the nature and extent of my losses was fully discussed and I filled in the introductory part of the sworn statement on proof of loss, that is, all the portion thereof that appeared above the paragraph numbered 1. Mr. Rogers assumed the obligation of filling in the balance of the proof of loss which I assumed that their said insurance company's adjuster knew the requirements of said carrier in this regard. I have no information as to whether or not further writings were placed upon said proof of loss after I had executed and delivered the same, and if there has been, who made such writings is of course unknown to me, that at all times prior to the filing of said proof of loss, I willingly and promptly did everything that both Mr. Rogers and Mr. Plummer directed of me and at no time did I refuse to divulge or reveal any information requested.

Some several weeks later, but prior to April 30, 1953, Mr. John W. Smith, adjuster for the General Adjustment Bureau, Inc. from Sacramento, called on me at my residence and questioned me at great length relative to the fire and my losses at which time I fully cooperated and fully answered every question asked. He also interrogated me relative to my entire working history, with whom I worked, etc. and also delved into my personal life. Nothing further was heard until I received the General Adjustment Bureau's letters of April 29th and 30th, which are exhibits "B" and "C" respectively on the

affidavit of J. W. Smith heretofore filed in the above entitled matter by the defendant. I then saw Mr. Plummer and told him of the receipt of these letters and their respective contents and Mr. Plummer stated in effect that he was fearful that the company would not pay under the policy and these letters could be the foundation for their said refusal and further advised me to see a lawyer before I appeared for the sworn examination requested therein. I then employed L. C. Smith and Leander W. Pitman, and since that time have been represented by said attorneys.

That on the 11th day of June, 1953, I filed an action in the Superior Court of the State of California in and for the County of Shasta seeking to recover for my said losses. A copy of said complaint is attached hereto. (The subject insurance policy is attached to said complaint but in view of the fact that it is also attached as Exhibit "A" to the Complaint of the above entitled action, reference is hereby made to said document and made a part hereof for every purpose.) Thereafter, the defendant The London and Lancashire Insurance Company, Ltd., filed their answer, a copy of which is attached hereto marked Exhibit "B" and by reference made a part hereof; however, reference is hereby made to Paragraph V therein wherein said defendant insurance carrier denied all liability, and further, to Paragraph II wherein appears affirmative allegations relative solely to alleged defects in the proof of loss and to the alleged failure of plaintiff to submit to examination under oath.

That said case came to trial on November 3 and 4, 1953, at which time he was called as a witness and after being first duly sworn testified fully as to the origin of the fire, the nature of the losses, cost price of the losses and market value of the losses and the nature of items lost, which covered the full subject matter that any other examination under oath would cover. At the close of plaintiff's testimony, the court expressed itself as of the opinion that this plaintiff had a substantial sum of money due and owing him under the terms of the policy, that there was a grave question in his mind as to whether or not the request of the insurance company demanding the insured to submit to an additional examination under oath might under the law be said to have been fully complied with and for that reason of thought that the path of litigation might be hazardous. The counsel for plaintiff replied that if the Court was of that opinion, that so far as the plaintiff was concerned, he would raise no objection to the Court granting a non-suit on its own motion, providing that it was without prejudice and the Court thereupon did so. (See Exhibit "C".)

After the dismissal of said action (November 4, 1953) I offered to submit to oral examination by my letter to the London & Lancashire Insurance Company, Ltd., dated December 21, 1953 (see Exhibit "A" attached to affidavit of A. J. Stocklmier) and on January 13, 1954, I submitted a supplemental proof of loss containing all the detail requested which for all material purposes was a duplication of the information heretofore presented and by said supple-

mental proof of loss increased the loss to $13,000.00.

Up to and including December 23, 1953, neither of the parties to said insurance policy invoked the provision thereof calling for an appraisal. On the 6th day of January, 1954, I received a registered letter with return receipt requested from the London & Lancashire Insurance Company, Ltd., addressed to me at Box 704, Redding, and dated December 23, 1953. In view of the fact that said Box 704 is not my box, the same could not be delivered to me until I was located and when located I immediately called therefor. By said letter of December 23, 1953, the insurance carrier for the first time purported to invoke the provision of the insurance policy relative to an appraisal and invoked the same approximately 11 months and 19 days after the fire and before the requested sworn examination was held. By my letter to the London & Lancashire Insurance Company, Ltd., of January 13, 1954 (see Exhibit "C" attached to Stocklmier's affidavit) I named H. J. Bachtold as an appraiser, subject, however, to the following condition:

"I demand that you forthwith and in any event on or before January 22, 1954, at the hour of 4:00 o'clock p.m. of said day pay to me the sum of $13,000.00 for the loss sustained by fire covered by policy No. PCD 983103 and if payment of said sum is not made within that time, your failure shall constitute an unconditional refusal to pay and a denial of liability".

To said letter I received no reply. Since said loss was not paid by 4:00 o'clock p.m. on January 22,

1954, and in view of the fact that under the provisions of the policy, the time to commence a suit thereon expired unless commenced within twelve months next after the inception of the loss (and January 22 was the last day an action could be filed within said twelve-month period), I directed my attorney to file an action in the Superior Court in and for the County of Shasta on said last day, to-wit, January 22, immediately following 4:00 o'clock p.m. of said day, which said action was thereafter removed to the above entitled Court. That although Mr. Bachtold requested a hearing and/or meeting for the ascertaining of appraisals for the week commencing on Monday, January 18 through Friday, January 22, 1954, by his letter dated January 15, 1954, to Howard T. Russell, the appraiser appointed by the insurance carrier, said Howard T. Russell did not seek to obtain a date for such hearing or meeting until January 27, 1954 (after the time to commence action had elapsed) when he telephoned Mr. Bachtold asking that a date be set.

/s/ GEORGE H. COX

Subscribed and sworn to before me this 18th day of November, 1954.

[Seal] /s/ MARION FRITZ,

Notary Public in and for the County of Sacramento, State of California.

Affidavit of Service by Mail attached.

EXHIBIT "A"

In the Superior Court of the State of California in and for the County of Shasta

No. 19286

George H. Cox, aka George M. Cox, Plaintiff, vs. The London and Lancashire Insurance Company, Ltd., a corporation, Defendant.

COMPLAINT

(Breach of Contract)

Comes now the plaintiff, above named, and for cause of action against the defendant, above named, alleges as follows:

I.

That the contract on which this cause of action is based is in writing.

II.

That at all times herein mentioned, the defendant, The London and Lancashire Insurance Company, Ltd., was, and now is, a foreign corporation, organized and existing under the laws of the Kingdom of Great Britain and Ireland, and authorized to carry on the business of fire insurance. That said defendant was at said times authorized to carry on the business of fire insurance in the State of California, by and through resident agents, and that one Frank B. Plummer was its duly authorized agent at Redding, California.

III.

That on the 19th day of December, 1952, and to and including the date of the fire hereinafter men-

tioned, the plaintiff was the owner of a dwelling house, and the furniture therein, at or near the Town of Redding, County of Shasta, State of California.

IV.

That in consideration of the premium of One Hundred Sixty-two and 50/100 ($162.50) Dollars paid to it by the plaintiff, the defendant, by its policy of insurance signed by one of its managers in the City of San Francisco, California, acting under power of attorney, and countersigned by its general agent, the De Veuve & Company, at San Francisco, California, under date of December 24, 1952, and delivered to the plaintiff in the Town of Redding, California, a copy of which policy of insurance is hereto annexed, marked "Exhibit "A", and made a part of this complaint by reference, insured the plaintiff against loss or damage by fire to the amount of Thirteen Thousand and no/100 ($13,000.00) Dollars on said property, from the 19th day of December, 1952, at 12 o'clock noon until the 19th day of December, 1955, at 12 o'clock noon.

V.

That the plaintiff has duly performed all the conditions on his part to be performed, and on the 25th day of January, 1953, said dwelling and furniture were greatly damaged by fire. That said fire did not occur from any of the causes excepted in said policy.

VI.

That the plaintiff's loss thereby was Fourteen Thousand Six Hundred Seventy and 40/100 ($14,-670.40) Dollars.

VII.

That the plaintiff immediately thereafter, on or about the 26th day of January, 1953, notified the defendant of said loss, and on or about the 20th day of March, 1953, and more than sixty days prior to the commencement of this action, furnished the defendant with due proof of said loss.

VIII.

That no part of said loss has been paid, and the sum of $13,000.00 is now due thereon from the defendant to the plaintiff, to plaintiff's damage in the sum of $13,000.00.

IX.

That at all times herein mentioned the dwelling house owned by the plaintiff, as aforesaid, was occupied for dwelling house purposes with the aforesaid furniture therein.

Wherefore, plaintiff prays judgment against the defendant, in the sum of $13,000.00 with interest thereon at the rate of seven per cent per annum from March 20, 1953, to and including date of judgment, together with his costs of suit incurred herein.

L. C. SMITH and
LEANDER W. PITMAN,
/s/ L. C. SMITH - LEANDER W. PITMAN,

Attorneys for Plaintiff

Duly Verified.

EXHIBIT "B"

[Title of Superior Court and Cause No. 19286.]

ANSWER

Comes now the defendant and answers the Complaint on file herein as follows:

I.

That defendant has no information or belief sufficient to enable it to answer the allegations of Paragraph III of said Complaint, and placing its denial upon that ground, denies each and every allegation therein contained.

II.

Answering the allegations of Paragraph V, defendant denies each and every allegation therein contained.

In this behalf defendant further alleges that upon demand plaintiff failed to render to defendant within sixty (60) days after said loss a written proof of loss signed and sworn to by the insured stating the knowledge and belief of the insured as to the following: The time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, and all encumbrances thereon together with verified plans and specifications of the building claimed to have been destroyed or damaged; and that upon further demand plaintiff failed and refused to submit to examination under oath.

III.

Answering the allegations of Paragraph VI, defendant denies each and every allegation therein contained.

IV.

Answering the allegations of Paragraph VII, defendant denies that it was furnished with due proof of said loss under the terms and conditions of said policy of fire insurance.

V.

Answering the allegations of Paragraph VIII, defendant denies that the sum of Thirteen Thousand Dollars ($13,000.00), or any sum whatsoever, is now due plaintiff from defendant and that plaintiff has been damaged in the sum of Thirteen Thousand Dollars ($13,000.00).

VI.

Answering the allegations of Paragraph IX, defendant has no information or belief sufficient to enable it to answer the allegation of Paragraph IX regarding plaintiff's ownership and placing its denial upon that ground, denies said dwelling house was owned by plaintiff as therein alleged.

Wherefore, defendant prays judgment that plaintiff take nothing by his Complaint and that it be dismissed with its costs of suit herein incurred.

KENNEDY & CALDWELL,
/s/ By LAURENCE J. KENNEDY, JR.,
Attorneys for Defendant

Duly Verified.

EXHIBIT "C"

[Title of Superior Court and Cause No. 19286]

JUDGMENT OF NON-SUIT

The above-entitled cause coming on regularly for trial on the 3rd day of November, 1953, L. C. Smith and Leander W. Pitman appearing as counsel for plaintiff and George Hauerkin, of the law firm of Hauerkin, St. Clair and Viadro, and Laurence J. Kennedy, Jr., of the law firm of Kennedy and Caldwell, appearing as counsel for defendant, a jury was regularly impanelled and sworn to try the same. The opening statement and witnesses and a portion of the proof on the part of the plaintiff having been heard, together with argument thereon, and the Court having duly considered the same and the sufficiency of plaintiff's case, whereupon, for insufficiency of plaintiff's proof, the Court made the following order upon its own motion and directed that judgment be entered accordingly.

Therefore, It Is Ordered and Adjudged that the action be dismissed without prejudice to the plaintiff and that defendant recover of the plaintiff his costs of suit, amounting to the sum of Twenty-Eight and 75/100 Dollars ($28.75).

Dated this.....day of November, 1953.

.....,
Judge of the Superior Court

[Endorsed]: Filed November 19, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the above named Defendants and to their Attorneys:

You and Each of You will please take notice that on the 4th day of April, 1955, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, the above named plaintiff will move the court for an order granting him leave to file his supplemental complaint. A copy of such proposed supplemental complaint is hereto attached and marked Exhibit "A" and by reference made a part hereof.

This motion will be made pursuant to Rule 15(d) of the Federal Rules of Civil Procedure and upon all of the papers and documents on file in the above entitled proceeding in the above entitled court.

Dated: March 29, 1955.

/s/ L. C. SMITH,
/s/ DEVLIN, DIEPENBROCK & WULFF,
/s/ LEANDER W. PITMAN,
Attorneys for Plaintiff

EXHIBIT "A"
SUPPLEMENTAL COMPLAINT

With leave of Court first had and obtained, now comes the above named plaintiff and files this his supplemental complaint setting forth the following

transactions or occurrences which have happened since the date of the complaint, to-wit:

I.

That by letter dated December 23, 1953, which was received by the above named plaintiff on January 6, 1954, the above named defendants invoked the provisions of the policy of fire insurance (referred to in the complaint of plaintiff) calling for an appraisal and thereby demanding that an appraisal be had pursuant to the policy's terms and conditions and, further, thereby selected Howard T. Russell, 1810 - 28th Street, Sacramento, California, as defendants' appraiser.

II.

That on or about the 13th day of January, 1954, the above named plaintiff objected to the appointment of Howard T. Russell as a distinterested appraiser and without waiving such objections said plaintiff appointed Harry J. Bachtold, 1740 Chestnut Street, Redding, California, as a competent and disinterested appraiser which appointment was subject to the condition that the defendants forthwith or in any event on or before January 22, 1954, at the hour of 4:00 o'clock p.m. of said day pay to the plaintiff the sum of Thirteen Thousand Dollars ($13,000.00) for the loss sustained by fire covered by the subject policy and if payment of said sum was not made within the time, defendants' failure shall constitute an unconditional refusal to pay and a denial of liability.

III.

That since the parties failed for fifteen (15) days from and after the date mentioned in said preceding paragraph to agree upon a disinterested umpire, Albert F. Ross, Judge of the Superior Court of the State of California, in and for the County of Shasta, did on or about the 22nd day of September, 1954, select W. N. Zachary as such umpire.

IV.

That on or about the 18th day of December, 1954, said W. N. Zachary notified the above named plaintiff and the above named defendants of the time and place of the hearing of the "Cox Appraisal" under the provisions of the aforesaid policy, to-wit, the 4th day of January, 1955, at the hour of 10:00 o'clock a.m. in the office of W. N. Zachary, 1410 Sacramento Street, Redding, California, and that at said time and place said two (2) appraisers and said umpire met and heard testimony and also made physical examination and inspection of the site of the destroyed dwelling and such ruins as remained and after such proceedings and evidence adduced, Robert L. Nusbaum appraised the loss of the house and garage in the total sum of Eight Thousand Dollars ($8,000.00) and Harry J. Bachtold appraised such loss in the sum of Ten Thousand Two Hundred Dollars ($10,200.00) and appraiser Robert L. Nusbaum made no appraisal of the value of the personal property lost in such fire but appraiser Harry J. Bachtold appraised the loss of said personal property in the sum of Five Thousand Two

Hundred Five Dollars ($5,205.00) and that on or about the 1st day of March, 1955, appraiser Harry J. Bachtold filed with said umpire his amended appraisal wherein he appraised the amount of the loss of said house and garage in the total sum of Nine Thousand Five Hundred Dollars ($9,500.00) and leaving his appraisal as to the loss of said personal property in the sum of Five Thousand Two Hundred Five Dollars ($5,205.00).

V.

That since the appraisal of the aforesaid appraiser Robert L. Nusbaum and appraiser Harry J. Bachtold ended in disagreement their said differences were submitted to umpire W. N. Zachary in accordance with the provisions of the aforesaid fire insurance policy and that thereafter on or about the 10th day of March, 1955, said umpire W. N. Zachary made his award in writing wherein and whereby the actual cash value of the actual cash loss of the dwelling house and garage was fixed in the sum of Nine Thousand Five Hundred Dollars ($9,500.00) and the actual cash value of the actual cash loss of each item of the personal property likewise destroyed in said fire was appraised, having a total value of Five Thousand Two Hundred Five Dollars ($5,205.00) and a copy of said award or appraisement is hereto attached and marked Exhibit "A" and by reference made a part hereof for every purpose; that on or about the 29th day of March, 1955, the said award or appraisement was filed with the defendant English-American Underwriters.

Wherefore, plaintiff prays that in addition to the remedies and relief prayed for in his original complaint that this Court adjudge and decree that said award and/or appraisement of appraiser Harry J. Bachtold and umpire W. N. Zachary shall be determinative of the amount of the actual cash value or the actual cash loss of the destroyed properties and that judgment be entered in favor of the plaintiff and against the defendants for the amount thereof, together with interest and costs of suit herein incurred, and for such other relief as the Court may deem meet and proper.

Dated: April....., 1955.

L. C. SMITH,
LEANDER W. PITMAN,
DEVLIN, DIEPENBROCK & WULFF,
Attorneys for Plaintiff

EXHIBIT "A"
AWARD OR APPRAISEMENT

We, the undersigned, Harry J. Bachtold, appraiser appointed by George H. Cox, and W. N. Zachary, umpire appointed by the Honorable Albert F. Ross, Judge of the Superior Court of the State of California, in and for the County of Shasta, under and by virtue of the provisions of a certain fire insurance policy No. PCD 983103 issued by the English-American Underwriters, agency of The London and Lancashire Insurance Company, Ltd., to George M. Cox under date of December

24, 1952, which said provision of said fire insurance policy reads as follows:

> "In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally."

do under the authority conferred upon us by the aforesaid fire insurance policy, hereby report, file, adjudge and appraise as follows:

1. That on or about the 18th day of December, 1954, we notified George H. Cox and his attorney, L. C. Smith, and the English-American Underwriters, agency of The London and Lancashire Insurance Company, Ltd., by and through its attor-

neys, George H. Hauerken and Laurence J. Kennedy, Jr., that the date and time of the hearing of the Cox appraisal, under the provisions of the aforesaid policy, would be held on January 4, 1955, at the hour of 10:00 o'clock, a.m., in the office of W. N. Zachary, at 1410 Sacramento Street, Redding, California, when and where we would meet with appraiser Robert L. Nusbaum, heretofore appointed by the English-American Underwriters, agency of The London and Lancashire Insurance Company, Ltd., as its appraiser under the aforesaid provision of the aforesaid fire insurance policy, and appraise the property insured against risk of loss by fire under the provisions of the above numbered fire insurance policy, and render a decision and award or awards as to its appraised value.

2. That in pursuance of said notice we met with appraiser Robert L. Nusbaum at the time and place mentioned in said notice to take evidence upon the dispute between George H. Cox and the English-American Underwriters, agency of The London and Lancashire Insurance Company, Ltd., as to the actual cash value or the amount of loss incurred by said George H. Cox as a result of a fire occurring on or about January 25, 1953; that on said 4th day of January, 1955, we met and heard the testimony of George H. Cox and also made a physical examination and inspection of the remains of the dwelling and its contents insured against loss by fire under the provisions of the aforesaid policy; that we have faithfully and fairly heard, examined and appraised the cost and value of the property insured

under the provisions of the aforesaid policy according to the principles of equity and justice; that we find from all of the evidence that the hereinafter described house and garage annexed thereto was apprised and its value was determined by appraiser Robert L. Nusbaum to be in the total sum of Eight Thousand and no/100 ($8,000.00) Dollars and by appraiser Harry J. Bachtold in the sum of Ten Thousand Two Hundred and no/100 ($10,200.00) Dollars: that appraiser Robert L. Nusbaum has made no appraisal of the value of the personal property hereinafter described; and that appraiser Harry J. Bachtold has appraised and determined the value of said personal property to be in the sum of Five Thousand Two Hundred Five and no/100 ($5,205.00) Dollars.

3. That thereafter and on or about the 1st day of March, 1955, appraiser Harry J. Bachtold amended his aforesaid appraisal of the value of the hereinafter described house and garage to read in the sum of Nine Thousand Five Hundred and no/100 ($9,500.00) Dollars, and leaving his appraisal of the value of the hereinafter described personal property at the sum of Five Thousand Two Hundred Five and No/100 ($5,205.00) Dollars.

4. That whereas the aforesaid appraisal by the aforesaid appraisers, Robert L. Nusbaum and Harry J. Bachtold, ended in disagreement; and whereas said appraisers have heretofore submitted their differences to umpire W. N. Zachary in accordance with the provisions of the aforesaid fire insurance policy; and whereas the said umpire has appraised

the hereinafter described house and garage annexed thereto and determined its value to be in the total sum of Nine Thousand Five Hundred and no/100 ($9,500.00) Dollars, and has also appraised the hereinafter described items of personal property and determined their value to be in the total sum of Five Thousand Two Hundred Five and no/100 ($5,205.00) Dollars;

Now, Therefore, we, the undersigned appraiser and umpire, hereby appraise and determine the actual cash value and the actual cash loss of the hereinafter described real and personal property as follows:

* * * * *

We, the undersigned appraiser and umpire, do hereby certify the above to be a full and fair appraisement of the actual cash value and the actual cash loss of the hereinabove appraised property insured under the provisions of California Standard Form Fire Insurance Policy No. PCD 983103 issued by the English-American Underwriters, agency of The London and Lancashire Insurance Company, Ltd.

In witness whereof we have hereunto subscribed our names as appraiser and umpire respectively this 10th day of March, 1955.

H. J. BACHTOLD, also known as
Harry J. Bachtold, Appraiser
W. N. ZACHARY, Umpire

State of California,
County of Shasta—ss.

On March 14, 1955, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Harry J. Bachtold and W. N. Zachary, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

Witness my hand and official seal.

ADELE MARIE ZACHARY,
Notary Public in and for said County and State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 29, 1955.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Plaintiff originally brought this action in the Superior Court of the State of California, in and for the County of Shasta, on a fire insurance policy seeking to recover the loss, which he alleges he sustained as the result of a fire. Defendant had the case removed to this Court on the jurisdictional basis of diversity of citizenship. Defendant moved this Court for a summary judgment. Argument on this motion was heard by this Court in due course, and the motion was submitted for decision after counsel, at the Court's request, filed memoranda in support of their positions. Thereafter, on a date subsequent to

the hereinafter described house and garage annexed thereto and determined its value to be in the total sum of Nine Thousand Five Hundred and no/100 ($9,500.00) Dollars, and has also appraised the hereinafter described items of personal property and determined their value to be in the total sum of Five Thousand Two Hundred Five and no/100 ($5,205.00) Dollars;

Now, Therefore, we, the undersigned appraiser and umpire, hereby appraise and determine the actual cash value and the actual cash loss of the hereinafter described real and personal property as follows:

* * * * *

We, the undersigned appraiser and umpire, do hereby certify the above to be a full and fair appraisement of the actual cash value and the actual cash loss of the hereinabove appraised property insured under the provisions of California Standard Form Fire Insurance Policy No. PCD 983103 issued by the English-American Underwriters, agency of The London and Lancashire Insurance Company, Ltd.

In witness whereof we have hereunto subscribed our names as appraiser and umpire respectively this 10th day of March, 1955.

H. J. BACHTOLD, also known as
Harry J. Bachtold, Appraiser
W. N. ZACHARY, Umpire

State of California,
County of Shasta—ss.

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Witness my hand and official seal.

ADELE MARIE ZACHARY,
Notary Public in and for said County and State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 29, 1955.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Plaintiff originally brought this action in the Superior Court of the State of California, in and for the County of Shasta, on a fire insurance policy seeking to recover the loss, which he alleges he sustained as the result of a fire. Defendant had the case removed to this Court on the jurisdictional basis of diversity of citizenship. Defendant moved this Court for a summary judgment. Argument on this motion was heard by this Court in due course, and the motion was submitted for decision after counsel, at the Court's request, filed memoranda in support of their positions. Thereafter, on a date subsequent to

the submission of the motion for summary judgment, but before a decision had been rendered, plaintiff moved this Court for leave to file a supplemental complaint pursuant to Rule 15(d) of the Federal Rules of Civil Procedure. This Court ordered this latter motion submitted, and announced that it would consider and decide both motions at the same time.

The motion for summary judgment, which was made by the defendant, is predicated on the single proposition that there had not been arbitration as to the dispute between the parties as to the actual cash value or the amount of loss, and that such an arbitration by the terms of the insurance policy is a condition precedent to bringing suit on the policy. The proposed supplemental complaint is intended to show that since the filing of the original complaint in this action arbitration has in fact been completed in the manner prescribed by the insurance policy.

Preliminarily, it is to be noted that this Court's decision as to the motion for summary judgment will be determinative of the fate of plaintiff's motion seeking leave to file a supplemental complaint in this case. This is for the reason that even though the granting or refusing of leave to file a supplemental pleading rests in the sound discretion of the trial court (Schuckman vs. Rubenstein, 164 F.2d 952, and United States vs. Caulk Co., 114 F. Supp. 939), a supplemental complaint based upon facts which occurred after the filing of the original complaint cannot be used to cure a complaint which

failed initially to state a cause of action (Bonner vs. Elizabeth Arden, Inc., 177 F.2d 703, and Berssenbrugge vs. Luce Mfg. Co., 30 F Supp. 101). Plaintiff's right to recover must be predicated upon facts in existence at the time the complaint was filed (Bowles vs. Senderowitz, 65 F. Supp. 548, and Porter vs. Senderowitz, 158 F.2d 435). It must therefore follow that if in this case no cause of action existed at the time the initial complaint was filed, for the reason that a condition precedent to bringing suit had not been satisfied, the supplemental complaint may not be filed to state a cause of action based upon facts occurring subsequent to the filing of the original complaint.

The sole question for this Court to determine in order to reach a decision on the motion for a summary judgment is whether or not arbitration was a condition precedent to bringing this action. The provisions of the California Standard Form Fire Insurance Policy (California Insurance Code, Sec. 2071), which are pertinent to the question before the Court, read as follows:

"Appraisal

"In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand.

"Suit

"No suit or action on this policy for the recovery

of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss."

It has long been the law in California that policy provisions such as those set forth above create a condition precedent to the bringing of a suit on an insurance policy when the amount of value of the loss is in dispute (Old Saucelito Land and Dry Dock Co. vs. The Commercial Union Assurance Co., 66 Cal. 253, and Adams vs. South British and National Fire and Marine Insurance Companies, 70 Cal. 198). However, arbitration exists as a condition precedent only when there is a failure of the parties to agree as to the amount or value of the loss, and if the insurance company denies liability on the policy, there is a waiver of arbitration as a condition precedent, since there is then not a dispute as to the amount of the loss, but rather a dispute as to the liability of the company (Farnum vs. Phoenix Ins. Co., 83 Cal. 246; Jacobs vs. The Farmers' Mutual Fire Ins. Co., 5 Cal. App. 2d 1; and Bass vs. Farmers' Mutual Protective Fire Ins. Co., 21 Cal. App. 2d 21). In order for the denial of liability to waive the arbitration condition precedent, and give a right to an immediate cause of action, it must be an unconditional denial, that is, it must be a denial based on something other than a dispute as to the amount of the loss or an objection to the proofs of loss (See: Farnum vs. Phoenix Ins. Co., supra; Jacobs vs. The Farmers' Mutual Fire Ins.

Co., supra; Bass vs. Farmers' Mutual Protective Fire Ins. Co., supra; and 3 ALR 2d 409). Some examples of denials of liability by insurance companies, which have been held to waive arbitration as a condition precedent, are: (1) a denial of liability on the basis that the policy did not exist as it had been cancelled two months before the loss (Farnum vs. Phoenix Ins. Co., supra); (2) a denial of liability on the basis that the policy had been rendered void by the fraudulent representations of the insured (Jacobs vs. The Farmers' Mutual Fire Ins. Co., supra); and (3) a denial of liability on the basis that the policy was void in that the insured made misstatements of fact in his application for fire insurance (Bass vs. Farmers' Mutual Protective Fire Ins. Co., supra). In the above examples, the insurance company did not question the amount or the proof of loss, but rather their complete liability under the policy. The American rule, as it is aptly set forth in 3 ALR 2d 409, is "that if the insurance company takes a stand of unconditional or total denial of any liability on the policy itself, the insured may maintain an action thereon notwithstanding there has been no such determination of loss or damage by third persons as required by the 'appraisement' or limited 'arbitration' clause." To summarize on this point, it may be properly said that the law is that an arbitration clause is a condition precedent to bringing suit when the amount of the loss is in dispute, except in those cases where there is an unconditional denial of liability by the insurance company.

In order to get the course of events leading up to this action in proper perspective, it will be helpful to set forth these events in their chronological order. These events occurred in the following sequence:

January 25, 1953. The fire occurred.

January 26, 1953. The plaintiff notified the defendant's agents of the fire.

March 20, 1953. Preliminary proof of loss was furnished to the defendant on or about this date.

April 29, 1953. John W. Smith, the defendant's adjusting representative, requested an examination of the plaintiff under oath on May 7, 1953, as provided for in the policy.[1]

April 30, 1953. Mr. Smith again wrote to the plaintiff informing him that the preliminary proof of loss was insufficient. At this time it was stated in the letter to the plaintiff that defendant was neither denying or admitting liability; admitting the amount of the loss; nor waiving any of the conditions of the policy.

June 11, 1953. Action was filed by the plaintiff against the defendant in the Superior Court of the State of California in and for the County of Shasta.

July 17, 1953. Defendant filed an answer in the case filed by plaintiff denying liability on the policy.

November 3-4, 1953. Action was tried in the Superior Court of the State of California in and for the County of Shasta, and on the latter day a non-

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[1] The plaintiff refused to submit to an examination under oath claiming that he had already been examined.

suit was granted on the ground that the plaintiff had failed to submit to an examination under oath as required by the terms of the policy.

December 21, 1953. Plaintiff offered to appear for examination under oath.

December 23, 1953. Defendant wrote to the plaintiff and invoked the appraisal provisions of the insurance policy, and in this letter defendant appointed its appraiser.

January 7, 1953. Plaintiff was examined under oath in accordance with his offer of December 21, 1953.

January 13, 1953. A supplemental proof of loss was furnished to the defendant at the defendant's request.

January 13, 1954. Plaintiff advised the defendant that he had not received defendant's letter invoking the appraisal provisions of the policy until January 6, 1954, as it was incorrectly addressed,[2] and at this same time, plaintiff appointed his appraiser subject to the condition that liability be admitted by the defendant, or that the loss be paid on or before January 22, 1954, the last day on which plaintiff could file suit to recover his losses without being barred by the terms of the policy.

January 22, 1954. Plaintiff filed this action in the Superior Court of the State of California in and for the County of Shasta.

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[2] Defendant asserts that the address used on its letter of December 23rd was the address provided to defendant by plaintiff.

March 9, 1954. Defendant had this action removed to this Court.

There is no issue in this case as to whether arbitration was completed prior to the filing of the initial complaint since both parties freely admit that while appraisal proceedings had been commenced, the proceedings had not been completed prior to the filing of the complaint by plaintiff.

In opposition to the motion for summary judgment the plaintiff contends: (1) that submission to arbitration was not a condition precedent to bringing suit in this case, as there was no dispute as to the amount of loss in that the insurance company had denied liability on the policy; and (2) that defendant waived its right to raise the condition precedent of arbitration as a defense by its failure to demand an appraisal until such a late date that it could not be completed before the expiration of the twelve-month period in which suit was required to be brought by the terms of the policy, and for the further reason that the defendant did not raise this defense until after the expiration of the twelve-month period.

Plaintiff's first contention, namely, that there was no dispute as to the amount of the loss in that there was a denial of liability, is based primarily on the argument that the insurance company denied liability on the policy in their answer to the complaint originally filed by plaintiff in the Superior Court on June 11, 1953, and that liability was denied in the answer to the complaint now before this Court, which complaint was filed in the Su-

perior Court on January 22, 1954. Plaintiff has not cited any case authority in support of his position that a denial of liability in an answer to a complaint constitutes a denial such as would remove the arbitration condition as a precedent to the bringing of a suit on the policy. Furthermore, there does not appear to be any California authority on this point, but available case authority from other jurisdictions is contrary to plaintiff's contention. In 3 ALR 2d 416, the authorities there cited hold that a denial of liability by an insurance company, which is raised for the first time in an answer to a complaint, does not constitute a waiver of the condition precedent. None of the cases there cited deal with the precise situation where there was an answer by an insurer to a complaint in a prior suit in which a nonsuit was granted, but there is nothing about this facet of the situation which would seem to call for or justify the application of any different rule from that just cited.

Plaintiff also argues there was no condition precedent as the defendant did not admit liability, and thus the amount of loss was not the only issue in dispute. From the cases which have already been cited in this memorandum it is apparent that there must be some actual and affirmative act of denial of liability before there can be a waiver of a condition precedent, such as is involved in this case. The mere failure to admit liability is not sufficient.

There is nothing in the record which indicates that there was the required denial of liability on the part of the defendant in this case. To the contrary,

the defendant made it clear in its letter of April 30, 1953, to the plaintiff, that it was not denying or admitting liability, and that it was not waiving any of the conditions of the policy. By this same letter it was also made clear that the defendant was not satisfied with the plaintiff's proof of loss. Therefore, plantiff's first contention in opposition to the motion for summary judgment is without merit.

Plaintiff's second contention in opposition to the motion for a summary judgment, namely, that defendent waived its right to raise the defense of arbitration as a condition precedent, is likewise without merit. Both parties to this action accuse the other of dilatory tactics. Viewed from an unbiased standpoint, the conduct of neither party is exactly exemplary, but litigation does not turn on vituperation, so suffice it to here say that plaintiff's main troubles spring from his failure to cooperate with the company by promptly complying with the terms of the contract, which he entered into with the defendant. Plaintiff asserts that he was prejudiced by defendant's tardy demand for appraisal proceedings in that such proceedings could not be completed within the period fixed under the terms of the policy for the bringing of a suit on the policy. Under the terms of the policy either party could demand the appraisal proceedings. However, the plaintiff did not do so, even though he should have known from the rejection of his proof of loss (for the reason that it was insufficient) that the amount of loss was in fact in dispute. Furthermore, plaintiff did not submit a supplemental proof of loss

until January 13, 1954, some eight months after his original proof of loss was rejected by the defendant. There is no provision in the policy which obligates either the company or the insured to demand an appraisal before a time certain, and the company could not be reasonably expected to demand an appraisal until the insured had complied with the terms of the policy, which would provide the company with the data from which the company could determine whether an appraisal would be necessary.

Plaintiff argues that there was no condition precedent of arbitration prior to the insurer's demand for appraisal. What he is actually saying is that the demand for appraisal proceedings is a condition precedent to the condition precedent of arbitration. The facts in this particular case answer plaintiff's argument on this point, for even if a demand for appraisal were necessary to invoke the condition precedent of arbitration, the plaintiff cannot avoid the requirement of this condition precedent, since a demand for appraisal was in fact made by the defendant.

Plaintiff has cited Bollinger vs. National Fire Ins. Co., 25 Cal. 2d 399, in support of his contention that the defendant, by raising the defense of the condition precedent for the first time after the limitation on the bringing of a further action had run, waived the right to raise the defense. The Bollinger case involved a situation where the complaint had been filed after the statute of limitations had run. The Supreme Court of the State of California held the action was permissible, as under the

circumstances the statute of limitations had been suspended or tolled. The circumstances leading to this result were: (1) a prior suit by the plaintiff had been commenced within four months of the fire; (2) the insurance company had requested continuances by which it had delayed the trial of the case; (3) after the time for bringing suit had expired, the insurance company raised, for the first time, the defense that the suit had been premature; and (4) a nonsuit had been granted. The court held that the prior suit had not been premature and that the defendant by causing the delay, and waiting for almost one year to raise the defense that the suit was premature, had waived its right to that defense, and therefore, the statute of limitations was suspended as to the filing of a new complaint.

From a factual standpoint, the Bollinger case is entirely distinguishable from the case now before the Court. In the Bollinger case the insurance company had the opportunity to raise the technical defense that the suit was premature for many months before the expiration of the time within which suit had to be brought. It was only through affirmative acts of the insurance company, namely, the requesting of continuances that the time for bringing suit expired before the insurance company first raised the defense, which, if it had been properly and timely raised, and remained uncured, would have defeated a hearing on the merits. In the case at bar, it is the insured who is primarily, if in fact not entirely, responsible for the delays, which grew out of his conduct in failing to comply with the patent

terms of the policy. Furthermore, and perhaps of more importance, the defendant, in the case at bar, did not have the opportunity to raise the defense of the condition precedent for a period of approximately one year prior to the date on which the right to commence the suit expired, as was the situation in the Bollinger case. The situation is entirely different in the instant case, since the company in fact had no opportunity to raise the defense prior to the expiration of the time for the bringing of the suit; the complaint having not been filed by plaintiff until the last possible day before the expiration of the twelve-month period within which the suit could be filed. If, as plaintiff contends, there was no arbitration condition precedent until a demand for appraisal had been made, the defendant could not have raised the defense in the prior action, which action resulted in a nonsuit, as there was no condition precedent of arbitration in existence at that time. Even if arbitration were a condition precedent at the time of the prior suit, a defendant is not required to exert all his defenses at one time, and the defendant is not responsible for the delay that resulted from that trial. The delay in raising the defense of the condition precedent until after the expiration of the time for bringing suit cannot under the facts in this case be attributed to the defendant.

To summarize, it can be fairly said that under the facts in this case, arbitration was a condition precedent to the bringing of the suit, as the amount of the loss was obviously in dispute. There was

not a sufficient denial of liability such as would constitute a waiver of this condition precedent, and there was not a waiver of this condition precedent by the raising of the defense of a condition precedent for the first time, after the period within which the suit might be brought, had run. Under the facts of this case and the law applicable thereto, defendant's motion for a summary judgment must be granted, and plaintiff's motion for leave to file a supplemental complaint must be denied.

It Is, Therefore, Ordered that defendant's motion for a summary judgment be granted, and that plaintiff's motion for leave to file a supplemental complaint be denied. Judgment will be entered in this action accordingly.

Dated: June 21, 1956.

/s/ SHERRILL HALBERT,
United States District Judge

[Endorsed]: Filed June 21, 1956.

In the United States District Court for the Northern District of California, Northern Division

No. 7037

GEORGE H. COX, also known as GEORGE M. COX, Plaintiff,

vs.

ENGLISH-AMERICAN UNDERWRITERS and THE LONDON & LANCASHIRE INSURANCE COMPANY, LTD., a corporation, Defendants.

SUMMARY JUDGMENT AND ORDER DENYING MOTION FOR LEAVE TO FILE A SUPPLEMENTAL COMPLAINT

The motion of the defendant for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure and the motion of the plaintiff for an order granting him leave to file his supplemental complaint pursuant to rule 15 of the Rules of Civil Procedure both having been presented, and the court being fully advised, the court finds that there is no genuine issue as to whether or not the plaintiff submitted to the demand of the defendant for an appraisal pursuant to the terms and conditions of the policy of insurance referred to in the Complaint prior to the filing of this action, and that the plaintiff did not submit to, and that there has been no appraisal pursuant to the terms of the policy of insurance, prior to the filing of this action, and that defendant is entitled to a summary judgment;

further, the court finds from the evidence before it that the motion for an order granting plaintiff leave to file a supplemental complaint should be denied.

It Is Therefore Ordered that the motion of the defendant, The London & Lancashire Insurance Company, Ltd., a corporation, (sued herein as English-American Underwriters and as The London & Lancashire Company, Ltd., a corporation) for a summary judgment be, and the same hereby is, granted that the plaintiff, George H. Cox, also known as George M. Cox, have and recover nothing by his complaint, and that the defendant, The London & Lancashire Insurance Company, Ltd., a corporation, recover its costs and charges in this behalf expended and have execution therefor.

It Is Further Ordered that the motion of the plaintiff, George H. Cox, also known as George M. Cox, for an order granting him leave to file his supplemental complaint be, and the same is hereby, denied.

Dated this 6th day of July, 1956.

/s/ SHERRILL HALBERT,
Judge of U. S. District Court

Affidavit of Service by Mail attached.

[Endorsed] Filed and Entered July 6, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that George H. Cox, also known as George M. Cox, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from summary judgment and order denying motion for leave to file supplemental complaint entered in this action on July 6, 1956.

Dated: August 1, 1956.

/s/ L. C. SMITH,
/s/ LEANDER W. PITMAN,
/s/ DEVLIN, DIEPENBROCK & WULFF,
Attorneys for Plaintiff and Appellant

[Endorsed]: Filed August 1, 1956.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to English-American Underwriters and The London & Lancashire Insurance Company, Ltd., a corporation, defendants, the sum of Two Hundred Fifty Dollars ($250.00).

The condition of this bond is that, whereas the plaintiff has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed August

1, 1956, from the judgment of this court entered July 6, 1956, if the plaintiff shall pay all costs adjudged against him if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated: July 30, 1956.

/s/ GEORGE H. COX,
Plaintiff
/s/ S. B. MILISICH,
Surety
/s/ GEORGE L. FLEHARTY,
Surety

Notary Public Certificate attached.

[Endorsed]: Filed August 1, 1956.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS

The following is a concise statement of the points upon which appellant intends to rely on the appeal in the above entitled matter:

I.

That the Court committed prejudicial error in granting defendants' motion for summary judgment.

II.

The Court committed prejudicial error in finding

that from the pleadings and affidavits on file no genuine issue as to any material fact was shown and that the defendants were entitled to a judgment as a matter of law.

III.

That the pleadings and affidavits are sufficient as a matter of law to support a judgment in favor of the plaintiff.

IV.

The Court erred in holding that submission to arbitration was a condition precedent to the maintenance and/or filing of said action.

V.

The Court erred in holding that the defendants had not waived their privilege to raise their plea of abatement on a purely technical grounds after the statute of limitations has run and in not asserting it promptly.

VI.

The Court erred in holding that the defendants were not estopped to raise this plea of abatement of the action.

Dated: August 1, 1956.

L. C. SMITH and
LEANDER W. PITMAN,
DEVLIN, DIEPENBROCK & WULFF,

/s/ By HORACE B. WULFF,
Attorneys for Plaintiff and Appellant

[Endorsed]: Filed August 1, 1956.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The above named plaintiff hereby requests the entire record to be printed.

Dated August 1, 1956.

L. C. SMITH and
LEANDER W. PITMAN,
DEVLIN, DIEPENBROCK &
WULFF,

/s/ By HORACE B. WULFF,
Attorneys for Plaintiff and Appellant

[Endorsed]: Filed August 1, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated.

Petition for removal, together with certain attached documents.

Answer to complaint.

Notice of motion for summary judgment by defendant, together with attached documents.

Affidavit of George H. Cox.

Notice of motion to file supplemental complaint.

Memorandum and order.

Summary judgment and order denying motion for leave to file supplemental complaint.

Notice of appeal.

Bond for costs on appeal.

Statement of points upon which appellant intends to rely upon appeal.

Designation of record on appeal.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 15th day of August, 1956.

[Seal] C. W. CALBREATH,
Clerk
/s/ By C. C. EVENSEN,
Deputy Clerk

[Endorsed]: No. 15235. United States Court of Appeals for the Ninth Circuit. George H. Cox, also known as George M. Cox, Appellant, vs. English-American Underwriters and The London & Lancashire Insurance Company, Ltd., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: August 16, 1956.

Docketed: August 21, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15235

GEORGE H. COX, aka GEORGE M. COX,
Appellant,

vs.

ENGLISH-AMERICAN UNDERWRITERS and THE LONDON & LANCASHIRE INSURANCE COMPANY, LTD., a corporation,
Appellees.

APPELLANT'S STATEMENT OF POINTS ON APPEAL

The appellant does hereby adopt as his statement of points on which he intends to rely on appeal the statement which was filed with the Clerk of the United States District Court, Northern Division of the Northern District of California, on August 1, 1956, and is contained in the original certified record.

Dated: August 20, 1956.

/s/ L. C. SMITH,
/s/ LEANDER W. PITMAN,
/s/ DEVLIN, DIEPENBROCK & WULFF,
Attorneys for Appellant

[Endorsed]: Filed August 21, 1956. Paul P. O'Brien, Clerk.